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No. 84-808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA, *et al.*,
Petitioners,

v.

WILLIAM P. CLARK, Secretary of the Interior,
PYRAMID LAKE PAIUTE TRIBE OF INDIANS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Endangered Species Act authorizes the Secretary of Interior to operate a federal reservoir for the conservation of endangered and threatened fish species where use of the reservoir in the manner sought by the petitioners would jeopardize the continued existence of the species and the reservoir has not been committed to any conflicting uses.

2. Whether the court of appeals properly deferred resolution of the extent of the Secretary's obligation under the Washoe Project Act to obtain reimbursement for the construction of Stampede Reservoir prior to the delivery of any water for a reimbursable purpose.

3. Whether the court of appeal's decision can be sustained on the alternative grounds that the sale of water from Stampede Reservoir for municipal and industrial use in the Cities of Reno and Sparks, Nevada, is not authorized by the Washoe Project Act or that the petitioners have neither standing nor a private right of action to compel the Secretary to obtain reimbursement for the cost of constructing Stampede Reservoir.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
RELEVANT STATUTES	1
STATEMENT OF THE CASE	1
ARGUMENT	10
1. The Endangered Species Act Issues Do Not Warrant Supreme Court Review	10
2. The Court of Appeals Properly Deferred a Decision on the Secretary's Reimbursement Obligation under the WPA	21
3. Several Alternate Grounds Support the Lower Courts' Result	24
CONCLUSION	26
APPENDIX	1a

TABLE OF AUTHORITIES

CASES Page

Andrus v. Glover Construction Co., 446 U.S. 608 (1980) 20
Berkemer v. McCarty, 104 S. Ct. 3138 (1984) 24
California v. Sierra Club, 451 U.S. 287 (1981) 25
Colautti v. Franklin, 439 U.S. 379 (1979) 20
Connor v. Andrus, 453 F. Supp. 1037 (W.D. Tex. 1978) 20
Cort v. Ash, 422 U.S. 66 (1975) 25
Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977) 19
Massachusetts Mut. Life Co. v. Ludwig, 426 U.S. 479 (1976) 24
National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976), *cert. denied sub nom. Boteler v. National Wildlife Federation*, 429 U.S. 979 (1976) 19
Nevada v. United States, 103 S. Ct. 2906 (1983) .. 2, 3, 4, 15
North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980) 19
Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973) 2
Roosevelt Campobello Intern. Park v. EPA, 684 F.2d 1041 (1st Cir. 1982) 19
Sierra Club v. Clark, 577 F. Supp. 783 (D. Minn. 1984) 20
Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976) 19
TVA v. Hill, 437 U.S. 153 (1978) 10, 12, 15-18, 20-22
Thigpen v. Roberts, 104 S. Ct. 2916 (1984) 24
United States v. Nevada, 412 U.S. 534 (1973) 2
United States v. Richardson, 418 U.S. 166 (1974) .. 25
Valley Forge College v. Americans United, 454 U.S. 464 (1982) 25
Warth v. Seldin, 422 U.S. 490 (1975) 25

STATUTES AND REGULATIONS

16 U.S.C. §§ 1531 *et seq.* 10-12, 14, 17-21
43 U.S.C. § 390b 1, 25
43 U.S.C. §§ 485-485(h) 23, 25

TABLE OF AUTHORITIES—Continued

	Page
43 U.S.C. §§ 614-614d	4, 12, 23
43 U.S.C. § 615bb	23
43 U.S.C. § 617c(b)	23
43 U.S.C. § 620c	23
45 Stat. 1058	23
70 Stat. 107	23
70 Stat. 777	4
72 Stat. 319	1
74 Stat. 225	23
Pub. L. No. 96-159, 93 Stat. 1225 (1979)	21
Pub. L. No. 97-304, 96 Stat. 1411 (1982)	21
32 F. R. 4001 (1967)	3
40 F. R. 29863 (1975)	3
50 C.F.R. § 17.11(h)	3
Nev. Rev. Stat. § 704.230	7
Nev. Rev. Stat. § 235.075	3
Nev. Admin. Code § 503.065	3
LEGISLATIVE MATERIALS	
H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955)	4, 25
H. R. Rep. No. 2055, 84th Cong. 2d Sess. 4 (1956) *reprinted in* 1956 U.S. Code Cong. & Ad. News 3758	5
S. Rep. No. 1829, 84th Cong. 2d Sess. 6 (1956)	5
1978 U.S. Code Cong. & Ad. News 9460	21
Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works, 95th Cong., 2d Sess. 361 (1978)	21
TREATISES AND ADMINISTRATIVE OPINIONS	
In Re Filing by Sierra Pacific Power Company, Docket Nos. 81-204, 84-665, slip op. at 15-17 (Pub. Serv. Comm. of Nev. Nov. 19, 1984)	8
9 Moore's Federal Practice ¶ 204.11[3] (2d ed.)	24

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BRIEF FOR RESPONDENT PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

RELEVANT STATUTES

In addition to the statutes relied on by petitioners (Petition "Pet." 2) Respondent Pyramid Lake Paiute Tribe relies on the Water Supply Act of 1958, 72 Stat. 319, as amended, 43 U.S.C. § 390b (Tribe App. 1a).[1]

STATEMENT OF THE CASE

Since 1970, each Secretary of the Interior ("Secretary"), including Secretaries Hickel, Morton, Hathaway, Kleppe, Andrus, Watt and Clark, has operated Stampede Reservoir, part of a federal reclamation project, for the authorized purposes of flood control, recreation, enhance-

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[1] "Pet. App." refers to the separately bound Appendix which the petitioners have filed pursuant to Supreme Court Rule 21.1(k). "Tribe App." refers to the Appendix to this Brief.

ment of fish and wildlife, and has made water releases for the benefit of Pyramid Lake's two principal fish, the cui-ui and the Lahontan cutthroat trout, which have been classified as endangered and threatened species respectively under the Endangered Species Act ("ESA"). In this case, the Carson-Truckee Water Conservatory District ("District"), the Sierra Pacific Power Company ("Sierra Pacific") and the State of Nevada (collectively "petitioners"), sued to compel the Secretary to sell the District water from Stampede Reservoir for resale for municipal and industrial ("M & I") purposes in Reno and Sparks, Nevada and to enjoin further water releases for the benefit of the endangered and threatened fish.

Stampede Reservoir is part of the Truckee River system which is described by the district court in its two decisions. Pet. App. 23a, 38a-39a.[2] Historically, Pyramid Lake[3] received the entire natural flow of the Truckee and Little Truckee Rivers. These rivers maintained the lake level and provided river spawning flows for the cui-ui and the Lahontan cutthroat trout. The lake level and spawning flows remain dependent upon the inflow from these two rivers. The inflow to the lake is much smaller now, however, because of upstream diversions and use of water for irrigation and M & I in Reno and Sparks. As a result, the level of Pyramid Lake dropped some 40 feet between 1920 and 1938. By 1921 a delta had formed at the mouth of the Truckee which prevented

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[2] *See United States v. Nevada*, 412 U.S. 534, 535-536 (1973); *Nevada v. United States*, 103 S. Ct. 2906, 2910 (1983). A map depicting the area in question is reproduced in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 259 (D.D.C. 1973).

[3] Pyramid Lake is surrounded by the Pyramid Lake Paiute Indian Reservation which was set aside in 1859. One of the purposes of the reservation "was to enable the Tribe to take advantage of the Pyramid Lake fishery, which among other things includes a native species of cutthroat trout, and the cui-ui fish, which exists nowhere else." Pet. App. 39a.

the cui-ui and Lahontan cutthroat trout from reaching their Truckee River spawning grounds, resulting in the near extinction of both species. Pet. App. 39a-40a; *Nevada v. United States*, 103 S. Ct. 2906, 2913 n. 7 (1983). By spawning along the edges of the lake where the fresh water entered, the cui-ui barely survived. The Lahontan cutthroat trout died out entirely and had to be reintroduced into the lake through artificial means. Pet. App. 40a.

The cui-ui (*Chasmistes cujus*) is a member of the sucker family (*Catostomidae*), the only pure species remaining in the genus *Chasmistes*, and is found only in Pyramid Lake. Pet. App. 39a, 48a. Its average size is four to six pounds, and reaches a maximum of 9 pounds. The cui-ui formerly constituted a staple of the diet of the members of the Pyramid Lake Tribe. In 1967, the Secretary declared the cui-ui an endangered species. 32 F.R. 4001 (1967). Pet. App. 14a, 27a, 40a-41a. *See* 50 C.F.R. § 17.11(h) (1983). The cui-ui is also classified as "endangered" pursuant to Nevada law, Nev. Admin. Code § 503.065, and is protected by tribal resolution which prohibits fishing for cui-ui.

The Lahontan cutthroat trout (*Salmo clarki henshawi*) belongs to the salmon and trout family (*Salmonidae*) and is one of the largest and finest sport fish in the world. The Pyramid Lake Tribe historically fished the trout for sustenance and commerce. Like the cui-ui, the trout spend most of their life in Pyramid Lake where they attain a size of 10 to 20 pounds. A 40 pound Pyramid Lake Lahontan cutthroat trout is the world record for the species. The Lahontan cutthroat trout was originally listed as an endangered species and, in 1975, was upgraded to the status of a threatened species. 40 F.R. 29863 (1975). Pet. App. 14a, 27a, 41a. *See* 50 C.F.R. § 17.11(h) (1983). It is the official state fish of Nevada. Nev. Rev. Stat. § 235.075.

Because of the highly seasonal nature of river flows in Western Nevada, a number of storage reservoirs have been built to provide flood control in the winter and a water supply during the summer. Virtually all of the reservoirs have been constructed by the Bureau of Reclamation ("Reclamation") in connection with the Newlands Project,[4] the Truckee Storage Project and the Washoe Project.

In 1956 Congress enacted the Washoe Project Act ("WPA").[5] The stated purposes were: (1) to irrigate approximately 50,000 acres in the Carson and Truckee River basins; (2) to provide drainage service to another 31,000 acres; (3) to firm up existing water supplies for the Newlands and Truckee Storage Projects; (4) to control floods; (5) to provide hydroelectric power; (6) to develop fish and wildlife resources; and (7) for "other beneficial purposes." As part of the project, the Secretary was authorized to construct Stampede Reservoir. Pet. App. 12a, 40a. Congress specifically considered whether the proposed project should provide M & I water to Reno and Sparks but concluded that existing water supplies were adequate to meet their needs if the cities implemented reasonable water conservation measures. H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955).

The WPA specifically recognized that the preservation of Pyramid Lake and restoration of its fishery were of national concern and authorized the Secretary to utilize project facilities for this purpose. Section 4 of the Act provides in part:

> Facilities shall be provided for the development of the fish and wildlife resources of the project area

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[4] The Newlands Project and its impact on the Truckee River and Pyramid Lake is described in *Nevada v. United States*, 103 S. Ct. at 2910-2913. *See also* Pet. App. 39a.

[5] Washoe Project Act of August 1, 1956, 70 Stat. 777, 43 U.S.C. §§ 614-614d. Pet. App. 12a, 24a, 145a-149a.

> including facilities to permit increased minimum water releases from Lake Tahoe and restoration of Pyramid Lake fishery.[6]

During 1964, storms and heavy rains caused flooding in the Reno-Sparks area. Reclamation studies revealed that Boca Dam, located on the Little Truckee River 20 miles upstream from Reno, might collapse during a maximum predictable flood for the area. Reclamation concluded that the most logical method of protecting Boca Dam would be to construct Stampede as expeditiously as possible. At the same time, the Bureau of Indian Affairs expressed strong opposition to the construction of Stampede Reservoir on the grounds that it would be inimical to the best interests of the Pyramid Lake Tribe and its fishery. Pet. App. 13a-14a, 26a.

The District and Sierra Pacific then urged that construction on Stampede begin even if only for flood protection purposes. Shortly thereafter, the Commissioner of Reclamation recommended that the Secretary authorize the immediate start of construction without executing a repayment contract with the District because the annual benefits of flood control, recreation and fish and wildlife enhancement justified going forward with construction of the dam solely on that basis. Pet. App. 14a, 26a. Therefore, without executing a contract with the District, the Secretary commenced construction of Stampede

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[6] The House Committee Report on the bill stated:

> The fishery of Pyramid Lake was once world famous and widely used by sportsmen in addition to forming a major contribution to the livelihood of Indians of the Pyramid Lake Indian Reservation . . . . Restoration of the Pyramid Lake trout fishery *to its full potential value* is deemed to be of national interest and importance. . . .

H. R. Rep. No. 2055, 84th Cong. 2d Sess. 4-5 (1956), *reprinted in* 1956 U.S. Code Cong. & Ad. News 3758 (*emphasis added*). The Senate report reiterated the national importance of the Pyramid Lake fishery. S. Rep. No. 1829, 84th Cong. 2d Sess. 6 (1956).

because there was an immediate need for flood control protection for Boca Dam and the Reno-Sparks area.

Construction on Stampede was completed in 1970. Pet App. 40a. Although the United States filed applications to appropriate the waters of the Little Truckee River stored in Stampede Reservoir with the Nevada State Engineer as early as 1954, those applications have never been acted upon owing to the unsettled state of Truckee River water rights. *See* Pet. App. 35a. As part of the Washoe project, Marble Bluff Dam and Fishway was completed in 1976. This $7.7 million facility at the mouth of the Truckee River enables cui-ui and trout to bypass the river delta and ascend to their spawning grounds and is also used to get cui-ui and trout out of the lake to take their eggs for incubation at the Tribe's hatcheries. Pet. App. 25a, 41a.

Since Derby Dam became operational in 1905, only those waters not diverted or stored by upstream users have reached the lower Truckee River and Pyramid Lake. Those flows reach their peak from mid-March through June when most of the winter snow melts. These spring flows are the primary reason for the cui-ui's survival. Stampede Reservoir could significantly reduce these spring flows because it is designed to capture and store that spring runoff. If Stampede captured the high spring runoff and held that water to meet M & I demand at other times of the year, the flow during the spawning season would be reduced below the level which caused the cui-ui and trout to become endangered and threatened. The district court found that this would "jeopardize the existence of the cui-ui and hasten their extinction." Pet. App. 50a.

Since Stampede's construction, however, the Secretary has never committed water stored in the reservoir to uses which would conflict with the fishery but has used the water in connection with the Pyramid Lake fishery

restoration program administered by the United States Fish and Wildlife Service. Pet. App. 48a-49a. In this way, the Secretary has carried out several of Stampede's primary purposes, such as flood control, recreation and restoration of the Pyramid Lake fishery, without jeopardizing the continued existence of the cui-ui or entirely halting reservoir operation. The Fish and Wildlife Service cui-ui restoration program consists mainly of developing a self-sustaining population through natural reproduction. Water is released from Stampede for three purposes: (1) to attract the spawning population to the mouth of the Pyramid Lake Fishway where they are captured for the Tribe's cui-ui hatchery or allowed to pass on to the lower Truckee River for natural spawning; (2) to provide the proper water temperature and volume for natural spawning in the river; and (3) to attract the trout to the fishway where they are captured and their eggs are taken for use in the three trout hatcheries. Pet. App. 48a-49a. Through data analysis and operational experience, the Fish and Wildlife Service has developed a lower Truckee flow regime which makes optimum beneficial use of the water available for the fishery.

Since Stampede's completion in 1970, no water from the reservoir has been diverted to Reno or Sparks for M & I use. Although this period included one of this century's most severe droughts, Reno and Sparks met 100% of their M & I needs from other sources. As the government's expert testified, "There are adequate sources to meet the M & I needs in the Truckee Meadows Basin in the year 2030 without the need for Stampede water if present constraints in the area against reasonable water conservation practices are overcome." The primary constraints are a state law prohibiting residential water meters in Reno and Sparks[7] and Sierra Pa-

[7] Nev. Rev. Stat. § 704.230. The prohibition applies only to Reno and Sparks. Other Nevada cities such as Las Vegas and Carson City have residential water meters.

cific's flat rate charge for residential water service. These constraints have caused per capita water use in Reno and Sparks to be much higher than in similarly situated areas. For example, the Reno and Sparks 1963-72 average per capita water use was 335 gallons per day ("gpd") compared with 230 gpd in Las Vegas, 154 gpd in Carson City and 197 gpd in Denver. This "lavish" consumption of water caused Congress to refuse to authorize M & I water for Reno and Sparks under the WPA.

Unwilling to implement reasonable water conservation measures or to purchase unused water rights and convert them to M & I use,[8] in 1976, the District, Sierra Pacific and Nevada brought this action to enjoin the release of water from Stampede for fishery purposes and to compel the Secretary to sell water to them for M & I use in Reno and Sparks. After trial on the merits, the district court bifurcated the post-trial briefing and argument. In its first decision (*"Carson-Truckee I"*, Pet. App. 23a-36a), the district court held that the Secretary could not be required to sell Stampede water needed to fulfill his obligations under ESA or his trust obligations to the Tribe. The court concluded, however, that to the extent that water is available for sale, the Secretary is

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[8] The Public Service Commission of Nevada recently admonished Sierra Pacific for its failure to aggressively attempt to purchase available water rights and ordered the company to institute a system whereby applicants for water service must receive water service commitments within 60 days of application. The Commission noted that some 28,000 acre-feet of water rights had been identified as being available for purchase, almost five times the amount currently needed to satisfy Sierra Pacific's entire waiting list. The Commission also noted that 63% of the projects on the waiting list have not yet secured government approval. These findings refute petitioners' claim that "[b]ecause the Secretary is presently prohibited from selling M & I water to the District, Sierra Pacific has been unable to meet its service commitments." Pet. 13. *See In Re Filing by Sierra Pacific Power Company*, Docket Nos. 81-204, 84-665, slip op. at 15-17 (Pub. Serv. Comm. of Nev. Nov. 19, 1984).

obligated to obtain reimbursement for the costs of Stampede and is authorized to sell Stampede water for M & I uses. The court also held that petitioners have standing to maintain this action and have a private right of action to enforce the Secretary's reimbursement obligation. Pet. App. 36a.

In its second decision (*"Carson-Truckee II"*, Pet. App. 37a-54a) the district court upheld the Secretary's decision not to sell Stampede water to petitioners on three grounds: First, ESA authorizes the Secretary to give priority to conserving the fish as long as they are endangered and threatened. Second, the Secretary's finding that there is no excess water to sell after fulfilling those statutory obligations was supported by substantial evidence. Third, petitioner's proposed alternate plan for the operation of the reservoir would jeopardize the existence of the fish.

The court of appeals affirmed the district court on all but one issue. Concerning *Carson-Truckee I*, the court vacated the district court's holding that the Secretary had an obligation under the WPA to obtain reimbursement for project costs by selling Stampede water for M & I uses. Noting that the WPA, in contrast to other reclamation project acts, did not prohibit construction pending execution of repayment contracts and that all of the project's water is currently needed to conserve the two species of fish, the court held that the WPA anticipates, but does not require, the Secretary to obtain reimbursement by selling water for M & I use. The court therefore did not need to resolve the extent of the Secretary's obligation to obtain reimbursement for the project in the future. Pet. App. 4a-5a, 8a.

Concerning *Carson-Truckee II*, the court of appeals rejected petitioners' argument, also made before this court, that the Secretary's only obligation is to avoid "jeopardiz[ing] the continued existence" of the fish under ESA

§ 7(a)(2). Relying on ESA §§ 2(b), (c), 3(3) and 7(a)(1), and this court's decision in *TVA v. Hill*, 437 U.S. 153 (1978), the court held that "the ESA supports the Secretary's decision to give priority to the fish until such time as they no longer need ESA's protection." Pet. App. 8a. The court explicitly refused to decide, however, whether the ESA required the Secretary to use all Stampede water for conservation purposes. *Id.*, n.5. Finally, the court of appeals affirmed the district court's holding that the Secretary did not abuse his discretion in rejecting petitioners' alternative plan because, *inter alia*, it is not feasible to operate Stampede for both M & I and fishery purposes. Pet. App. 8a-10a.

ARGUMENT

1. The Endangered Species Act Issues Do Not Warrant Supreme Court Review.

a. The petitioners misrepresent the decision of the court of appeals and its potential for impact on other federal projects and misstate this court's prior decisions in a futile attempt to create some basis for granting review. The decision of the court of appeals in the unique circumstances of this case, however, is correct and does not conflict with any decision of this Court or any other court of appeals.

In fact, petitioners cannot possibly prevail on the merits. They concede, as they must, that at a minimum the Secretary must insure that his operation of Stampede will not be likely to jeopardize the continued existence of the listed species (Pet. 10) and that in the event of an "irreconcilable conflict" between water for M & I use and water for the fish, the fish must be given priority (Pet. 12). The district court found that "it is not feasible to operate Stampede for both M & I and fishery purposes" and that petitioners' plan for the operation of Stampede "would jeopardize the existence of the cui-ui." Pet. App.

50a. The district court had previously found that "there is an 'irreconcilable conflict' between the Plaintiffs' request to compel the Secretary to execute a cost reimbursement contract and the well being of the Lahontan cutthroat trout." Pet. App. 20a. These findings of fact were affirmed by the court of appeals (Pet. App. 9a-10a) and have not been challenged in the Petition for Certiorari.

Having had a full and fair opportunity to demonstrate to the lower courts how Stampede could be operated for both M & I and fishery purposes and having failed, petitioners now claim that the point of their plan was "merely to illustrate one way in which the competing water needs could be reconciled." Pet. 10, n.3. They claim that the Secretary has a duty to establish an alternative plan through the § 7(a)(3) consultation process. *Id.* This argument falls short of creating a basis for review for several reasons. First, petitioners have not challenged the lower courts' *factual finding* that it is not feasible to operate Stampede for both M & I and fishery purposes; therefore, as a matter of undisputed fact, *no* alternative plan is possible and consultation is unnecessary. As explained by the district court (Pet. App. 50a), the precarious condition of both the cui-ui and the trout is attributable to inadequate flows of the Truckee River into Pyramid Lake. Consequently, further reductions in those flows can only make an already bad situation even worse. Second, the § 7(a)(3) consultation duty arises only if there is proposed agency action under § 7(a)(2). Petitioners also have not disputed the court of appeals' holding that § 7(a)(2) does not apply here because there is no proposed agency action. Pet. App. 8a. Third, before the district court the petitioners specifically rejected any notion that the Secretary should conduct a § 7(a)(3) consultation, preferring instead to rely on their own plan for the operation of Stampede. Having failed to convince the lower courts that their plan met the requirements of ESA, they cannot now advance an argument that has not only not previously been urged but has been

specifically rejected. Therefore, even assuming that petitioners are correct and the § 7(a)(2) standard is the only standard that applies to the Secretary's actions, petitioners cannot prevail because the lower courts expressly found that any M & I use of Stampede would jeopardize the continued existence of the fish. This result is completely in accordance with this Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978) and disposes of any argument that this case is worthy of review. Petitioners' real quarrel is with the district court's unchallenged factual findings, a manifestly unfit subject for review by this Court.

b. The result reached by the court of appeals in this case does not establish a broad precedent which will affect federal projects and programs generally. The instant case is unique in several respects. First, the requirements of the WPA and ESA are consistent since § 4 of WPA, 43 U.S.C. § 614c, expressly provides that one of the project purposes is restoration of the Pyramid Lake fishery. Second, using the water from Stampede for the fishery does not interfere with any vested water rights since the water has been used for the fishery since the project was constructed and has not been committed contractually or otherwise to anyone else. Third, conservation of the endangered and threatened fish of Pyramid Lake is the only use of Stampede which has been proposed which would not jeopardize the continued existence of those species. Thus, by using Stampede for that purpose, the reservoir can be used where otherwise it would remain empty, and in connection with such use can include the critical purpose of flood control. Fourth, since 1970, each Secretary of the Interior has affirmatively determined that Stampede should be used in this manner. For these reasons it is clear that the ruling below will have virtually no precedential impact.

In an attempt to create some basis for review by this Court of the court of appeal's decision, petitioners devote almost seven pages of their petition to a description of

federal programs and projects which they allege will be affected adversely by the decision below. Pet. 14-20. The single most important factor distinguishing those projects from the Washoe Project, however, is that the Secretary is not attempting to use any of them to conserve endangered and threatened species. The reason, of course, is that very rarely do circumstances arise in which an operator of a federal project or program is faced with the choice of either not proceeding with a project which would jeopardize the existence of endangered species or using the project to conserve that species. The fact that this issue has arisen only in connection with Stampede Reservoir and not with regard to any of the projects listed by petitioners (Pet. 15-16) is evidence of the limited circumstances in which an agency will be able to use a federal project to conserve endangered species.

For the same reason petitioners are wrong in suggesting that the court of appeal's decision will "convert the primary mission of the Air Force from national defense to the restoration of" endangered species (Pet. 16 n.8), cause federal highway funds to be impounded (Pet. 17) or force the Secretary of Agriculture to manage national forests solely to restore endangered species (Pet. 18). The court of appeal's limited holding did nothing more than approve the Secretary's discretionary decision to undertake a conservation program where the only available alternative was to abandon a federal project. Thus, the issue presented by the instant case cannot be expected to arise with any frequency in the future so as to render the decision below one of broad importance warranting review.

c. Moreover, petitioners base their main argument in support of review on a misrepresentation of the court of appeal's basic holding. They claim that the court of appeals *required* the Secretary to use *all* Stampede water *exclusively* for the "purpose of restoring the endangered and threatened species to their historical population levels" regardless of the "primary purpose" of the WPA.

Pet. 8. The "pernicious ramifications" of this holding, say the petitioners, will have serious consequences requiring Supreme Court review.

In fact, the court of appeals explicitly refused to decide this issue. In footnote 5 of its opinion, the court of appeals stated:

> Because we hold that the Washoe Project Act does not require the Secretary to sell water for M & I use, *we need not reach the question whether, given competing mandatory statutory directives, the Secretary would be required to use the project's water entirely for conservation purposes* under ESA § 2 (b), (c), § 3(3), and § 7(a)(1).

Pet. App. 8a n.5. (Emphasis added) The court of appeals did not hold that the Secretary was required to use all Stampede water exclusively for conservation purposes irrespective of the WPA. It merely held that, under the unique facts and applicable laws of this case, the ESA authorized the Secretary to give priority to conservation of the fish in his use of Stampede water and that the Secretary did not abuse his discretion in this use where the only alternative would be to make no use whatsoever of the reservoir. *Id.* at 6a-8a. Moreover, because the Secretary actively seeks to use the project for conservation purposes, the court of appeals declined to consider the Secretary's "affirmative obligations under ESA § 2 (b), (c), § 3(3), and § 7(a)(1)." Pet. App. 8a n.5. Thus, contrary to the contentions of petitioners, the Secretary was not "required" or "commanded" (Pet. 8) to do anything. This narrow holding scarcely has the "pernicious ramifications" petitioners describe.

Contrary to petitioners' further misrepresentations, neither the court of appeals nor the district court said anything about "restoring the . . . species to their historical population levels." Pet. 8-9. The courts found that "ESA also directs the Secretary to conserve threatened and endangered species to the extent that they are

no longer threatened or endangered." Pet. App. 6a, 46a. Given the tremendous size of the historical cui-ui and Lahontan cutthroat trout populations of Pyramid Lake, this difference is significant.

The lower courts also did not "require the Secretary to use all of the water . . . from all other reclamation projects in the area." Pet. 8. There is an obvious and vast difference between Stampede, which has been used from its inception for the benefit of the Pyramid Lake fishery, and other projects whose waters and water rights have been committed, sold to, adjudicated and vested in private users. In *Nevada v. United States*, 103 S. Ct. 2906 (1983), this Court held that holders of decreed water rights to the Truckee River in Nevada and subsequent appropriators with vested water rights were protected against the reserved water rights claims made on behalf of the Pyramid Lake fishery. Thus, petitioners' statements about this case requiring the Secretary to use water "from all other reclamation projects in the area" (Pet. 8) are groundless. This case involves only a dispute over unadjudicated and unappropriated waters of the Truckee River between the petitioners, who seek to take more water away from Pyramid Lake and appropriate it for new M & I use, and the Pyramid Lake Tribe and the United States government who are using those waters to preserve, maintain, conserve and restore Pyramid Lake's endangered and threatened fish.

d. To the extent that the court of appeals approved the use of Stampede's water for conservation, this Court's decision in *TVA v. Hill* amply supports this holding. In particular, the *TVA* Court rejected petitioners' primary contention: that the Secretary must balance ESA's protections against the "primary mission" of a pre-existing federal act.

In *TVA*, this Court addressed the issue of priority between the ESA and other federal acts, and resolved the issue in favor of the ESA. Faced with the choice between

abandoning the Tellico Dam and exterminating the snail darter, this Court placed heavy reliance on the ESA's legislative history in determining that Congress intended the 1973 version of ESA to take precedence over the "primary missions" of federal projects. 437 U.S. at 185. This Court thus issued a decision which could have caused a total abandonment of the Tellico Dam in order to save the snail darter.[9]

The plaintiff in *TVA* argued, as do petitioners, that Congress did not intend such abandonment of primary missions. This Court pointed out, however, that Congress specifically deleted language from the prior ESA which required agencies to conserve species only "*insofar as practicable and consistent with their primary purposes.*" 437 U.S. at 181 (emphasis in original). The *TVA* Court held that Congress' "pointed omission" of this language "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185. Thus, *TVA* precludes any need for further review of petitioners' contention that the ESA gives a federal agency "neither the duty nor the discretion to ignore the primary directive given it by Congress." Pet. 19.

Apparently recognizing the weakness of their position, petitioners then attempt in vain to manufacture a reviewable issue by distinguishing *TVA* factually on the ground

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[9] This case presents much less extreme facts than *TVA v. Hill* where the project could not provide *any* of its promised benefits if the gates were not closed. Stampede is operating and providing substantial flood control, recreation and fish and wildlife benefits. Indeed, at the time construction was authorized, Reclamation estimated that those benefits alone justified Stampede's cost. In addition, Reclamation is in the process of constructing a power plant at Stampede to provide additional monetary as well as energy benefits. Finally, whereas ESA required the *abandonment* of Tellico Dam in favor of the snail darter, in this case it requires the *use* of Stampede for the benefit of the fish. Congress declared that the value of conserving such species is "incalculable." *TVA v. Hill*, 437 U.S. at 178, 187-188.

that the Tellico project presented an "irreconcilable conflict" with the ESA, whereas they allege there is no conflict here because their proposed alternative plan would permit both sale of sufficient water for M & I use and retention of enough water to avoid "jeopardiz[ing] the continued existence" of the fish. Pet. 12. This distinction fails for two reasons. First, the lower courts found that it is not feasible to operate Stampede for both M & I and fishery purposes. Consequently, there is an irreconcilable conflict in this case, just as there was in *TVA*. Second, there is no indication in *TVA* that the decision was limited to cases of irreconcilable conflict. This Court's broad and inclusive language negates any potentially narrow construction: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." 437 U.S. at 184.

Petitioners further claim that this Court should grant review because the court of appeals erred in holding that "the Secretary has an affirmative duty under the Endangered Species Act to restore the Pyramid Lake fish to the point where they no longer merit protection" and ridicule the lower courts' reliance on §§ 2(b) and(c), 3(3) and 7(a)(1) of ESA as "a strange and tortured" interpretation. Pet. 8-9. Again, petitioners' argument is directly contrary to *TVA* which repeatedly states that federal agencies have an affirmative conservation duty under these same four ESA sections. This Court noted that "Congress expressly stated in § 2(c) that 'all Federal departments and agencies *shall* seek to *conserve endangered species* and threatened species. . . .'" 437 U.S. at 180 (emphasis in original). This Court further cited the legislative history of the 1973 amendments, stating that "the purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that these purposes are carried out. . . ." *Id.* at 184 (em-

phasis in original). "Agencies in particular are directed by §§ 2(c) and 3(2) of the Act to 'use . . . *all methods* and procedures which are necessary' to preserve endangered species." *Id.* at 185 (emphasis in original). Thus, this Court's reading of those sections of ESA in *TVA* mirrors that of the lower courts in this case. Pet. App. 6a-8a, 43a-46a.

Perhaps mindful that they are "swimming upstream" against a strong current, petitioners purport to find a basis for review in dictum in *TVA* to the effect that "Congress foresaw that § 7 would, *on occasion*, require agencies to alter ongoing projects in order to fulfill the goals of the Act." *Id.* at 186 (emphasis supplied). Petitioners claim that "'occasion" means only cases of "irreconcilable conflict" and that, absent such conflict, a federal agency need only avoid "jeopardiz[ing] the continued existence" of the species. Pet. 18. To illustrate an "occasion" to which it referred, however, the *TVA* Court quoted a House Committee Report which stated that, under the authority of § 7, the U.S. Park Service would be required "to conform the practices of [the] agency" to the need for protecting the rapidly dwindling stock of grizzly bears within Yellowstone Park and that appropriate measures could include "supplying them with carcasses from excess elk within the park." 437 U.S. at 187. This activity is far beyond merely not "jeopardiz[ing] the continued existence" of the grizzly bears; it is an affirmative conservation act required of all agencies directed by the ESA to "use . . . all methods and procedures which are necessary" to preserve endangered species. *Id.* at 185. The "occasion" to which this Court referred is not a case of irreconcilable conflict, but rather the presence of endangered or threatened species within the agency's jurisdiction.

Petitioners also complain that the court of appeals "totally fails to take into account" the language of § 7(a)(2) concerning "jeopardiz[ing] the continued existence" of species. Pet. 9-10. The court of appeals,

however, specifically considered and rejected petitioners' § 7(a)(2) argument, relying on *TVA* to hold that "the purpose of ESA § 7(a)(2) is to ensure that the federal government does not undertake actions, such as building a dam or highway, that incidentally jeopardize the existence of endangered or threatened species." Pet. App. 7a-8a. The court of appeals found § 7(a)(2) inapplicable here because "the Secretary has not undertaken a project that threatens an endangered species." Pet. App. 8a.

Petitioners also incorrectly claim there is a conflict between the court of appeals' decision below and decisions of other circuits. Pet. 19. In this case the court of appeals found that ESA § 7(a)(1) and related sections authorize the Secretary to utilize Stampede Reservoir to conserve the endangered and threatened species where the reservoir is capable of such use, the alternative would be to abandon the project, and no vested property rights would be impaired. ESA § 7(a)(2) was found to be inapplicable as no government action is proposed which would jeopardize either species. In the cases cited by petitioners, only § 7(a)(2) applied because the activities involved were not of the type which could be utilized to benefit endangered or threatened species. *See, e.g., Roosevelt Campobello Intern. Park v. EPA*, 684 F.2d 1041 (1st Cir. 1982) (EPA issuance of NPDES permit for oil refinery); *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980) (sale of oil and gas leases); *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976) (construction of dam and reservoir would flood caves containing endangered bats); *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), *cert. denied sub nom. Boteler v. National Wildlife Federation*, 429 U.S. 979 (1976) (construction of interstate highway). The decision below is consistent with these cases and with cases in which the courts have found that an activity or project could be used to conserve endangered and threatened species and that there is a duty to do so. *See, e.g., Defenders of Wildlife v. Andrus*, 428 F. Supp.

167, 169-170 (D.D.C. 1977); *Connor v. Andrus*, 453 F. Supp. 1037, 1041 (W.D. Tex. 1978); *Sierra Club v. Clark*, 577 F. Supp. 783, 789 (D. Minn. 1984).

Finally, petitioners argue that, even if the Secretary has an affirmative duty to use his "authorities" to conserve the fish, the term "authorities" should be limited to the Secretary's authorized fisheries expenditures under the WPA.[10] Petitioners cite no authority for this proposition, which this Court soundly rejected in *TVA*. Relying on §§ 2(c) and 3(2), the *TVA* court held that "agencies . . . are directed by . . . the Act to 'use . . . *all methods* and procedures necessary' to preserve endangered species." 437 U.S. at 185 (emphasis in original). There is no indication anywhere in *TVA* that this Court intended a narrow reading of an agency's ESA duties. In fact, the TVA Court pointed out that Congress intended federal agencies "*to devote whatever effort and resources were necessary* to avoid further diminution of national and worldwide wildlife resources." (Emphasis in original). *Id.* at 177.

Thus, *TVA v. Hill* addressed and decided every ESA issue petitioners have raised. Since *TVA v. Hill* was decided in 1978, Congress has amended ESA six times. Neither § 7 nor this Court's interpretation of that section has been significantly altered. Indeed, in considering amendments to ESA immediately after the decision in *TVA v. Hill* was announced, Congress specifically considered the *TVA v. Hill* decision but declined to amend the operative language of § 7 to lessen the obligation of

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[10] This construction would render § 2(c) and § 7(a)(1) superfluous. There would not be any need for those provisions if Congress merely intended to authorize federal officials to exercise the powers that they already had been granted. To make the statute meaningful, the directive that federal agencies "shall utilize their authorities" must be construed to encompass activities that otherwise could not have been undertaken. *See, Andrus v. Glover Construction Co.*, 446 U.S. 608, 618 n. 19 (1980); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *TVA v. Hill*, 437 U.S. at 173 n. 18.

federal agencies to conserve endangered and threatened species. *See* 1978 U.S. Code Cong. & Ad. News 9460; *Amending the Endangered Species Act of 1973: Hearings on S. 2899 Before the Subcommittee on Resource Protection of the Senate Committee on Environment and Public Works*, 95th Cong., 2d Sess. 361-362 (1978). Instead, Congress established a procedure whereby federal agencies now can receive exemptions from the requirements of ESA through a seven member cabinet level committee. *See* ESA § 7(e)-(p), 16 U.S.C. § 1536(e)-(p). This exemption process has never been invoked by petitioners with regard to their request for M & I water from Stampede. In 1979, § 7 was amended to separate the section into subsections 7(a)(1), (2), and (3). The language of § 7(a)(1) which existed prior to *TVA v. Hill* was retained. *See* Pub. L. No. 96-159, 93 Stat. 1225, 1226 (1979). Section 7(a) was again amended in 1982 to redesignate then subparagraph (3) as subparagraph (4) and to insert what is now § 7(a)(3). Again, § 7(a)(1) remained unaltered. *See* Pub. L. No. 97-304, 96 Stat. 1411, 1417 (1982). Since 1978, Congress has had ample opportunity to amend the ESA in the manner desired by petitioners but has consistently declined to do so.

2. The Court of Appeals Properly Deferred a Decision on the Secretary's Reimbursement Obligation under the WPA.

The court of appeals vacated the district court's decision on one narrow point. The district court held that, to the extent there is water from Stampede that is not needed to fulfill the Secretary's trust obligations to the Tribe or to protect the endangered and threatened species, the Secretary is required to sell that water for M & I use to obtain reimbursement for the cost of constructing the reservoir. Pet. App. 35a-36a, 38a. The court of appeals found it unnecessary to reach this issue, holding that "we need not resolve the extent of the Secretary's obligation to obtain reimbursement for the project in the future" and that "the Secretary's asserted obligation to sell proj-

ect water for M & I purposes should be considered when his superseding obligations . . . under ESA have been fulfilled." Pet. App. 5a.

The court of appeals deferred decision on this issue because: (1) the WPA contemplates non-M & I uses of water which may require Secretarial consideration if water becomes available for sale, Pet. App. 4a, and (2) Congress pointedly omitted from the WPA any requirement to enter into reimbursement contracts *before* construction and, therefore, the WPA anticipates but does not require the Secretary to sell water to recover construction costs. Pet. App. 5a. The court's deferral of the reimbursement question removes reimbursement as an issue for this Court's review.

In a futile attempt to create an issue for review, however, petitioners incorrectly claim that the court of appeals actually decided the issue and held that the Secretary is under no obligation to obtain reimbursement for the cost of constructing Stampede. Pet. 21. Even assuming the court of appeals actually decided the issue, however, the question is not worthy of review by this court for several reasons.

First, even if the WPA required the Secretary to obtain reimbursement for Stampede construction costs by selling water, the ESA clearly supersedes that obligation under *TVA v. Hill*, *see* § 1 above, and there is no factual or legal issue concerning the Secretary's reimbursement obligation until water is actually available. Second, there is no statutory obligation requiring reimbursement for Stampede construction costs. Contrary to petitioners' contentions, Pet. 21, no general reclamation law requires repayment contract coverage prior to the start of construction of a multi-purpose project such as the Washoe Project and no case or other authority imposes that obligation on the Secretary. Reclamation has adopted a general policy requiring repayment contracts before construction unless there are good and sufficient reasons to

waive the requirement.[11] Congress has never, however, expanded this policy into a general requirement covering the many categories of Reclamation projects. In fact, the court of appeals pointed out that when Congress has directed that reimbursement for project costs is mandatory, it has spelled out that requirement in unmistakable terms in the particular authorizing legislation.[12] With regard to the WPA, Congress only required that the Secretary must enter into repayment contracts before delivering water for reimbursable purposes. Pet. App. 5a, 147a; 43 U.S.C. § 614a(c).

Petitioner's reliance on 43 U.S.C. § 485h(a), Pet. 22, is also misplaced. Section 485h(a) does not obligate the Secretary to obtain reimbursement. It simply provides that the Secretary cannot make any expenditures for the construction of a new project until a report has been submitted to Congress on, among other things, the amount of the project cost which will "probably be repaid" by the project's users. If this amount plus certain other costs equals the total construction cost, the Secretary may proceed without further congressional authorization; if not, further authorization is necessary. In the case of the Washoe Project, the Secretary did not rely upon the general authority contained in 43 U.S.C. § 485h(a), but rather submitted a feasibility report to Congress and obtained specific congressional authorization. Thus, 43

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[11] The requirement was waived with regard to the construction of Stampede after Reclamation determined that the annual benefits of flood control, recreation and fish and wildlife justified construction solely for those uses and that there was an immediate need for flood control protection. Pet. App. 13a.

[12] Pet. App. 5a (San Angelo Project); Act of June 27, 1960, P.L. 86-529, § 2, 74 Stat. 225, 43 U.S.C. § 615bb (Norman Project); Act of April 11, 1956, ch. 203, § 4, 70 Stat. 107, 43 U.S.C. § 620c (Colorado River Storage Project); Act of December 21, 1928, ch. 42, § 4, 45 Stat. 1058, 43 U.S.C. § 617c(b) (Boulder Canyon Project).

U.S.C. § 485h(a) does not require reimbursement in the circumstances of this case.

3. Several Alternate Grounds Support the Lower Courts' Result.

In addition to the ESA, several grounds rejected below support the result reached by the lower courts.[13] Erroneous decisions on these issues led both courts to reach the ESA question and the district court to reach the reimbursement obligation question.

First, the Secretary has no authority to sell Stampede water for M & I use in Reno and Sparks. The WPA's legislative history makes it clear that Congress decided that M & I use of Stampede water was unnecessary except in a few resort areas. The feasibility report for the project stated that "in most cities [in the Washoe Project area] existing water supplies are adequate for the foreseeable future" and that "the project does not provide for increasing domestic water supplies." The report specifically considered and *rejected* M & I use for Reno and Sparks:

> In most communities the existing domestic water supplies are considered adequate for the foreseeable future. . . . Because Nevada State Law which prohibits the metering of water in a city with a population of more than 4,500, considerably more municipal water is used in Reno and Sparks than in cities elsewhere in the country of comparable size and

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[13] Since the Tribe raises these arguments solely to defend the judgment of the district court dismissing the complaint with prejudice (Pet. App. 55a-56a) and does not seek to expand the relief granted, no cross-petition is necessary. U.S. Sup. Ct. Rule 10.5. *See Thigpen v. Roberts*, 104 S. Ct. 2916, 2918 (1984); *Berkemer v. McCarty*, 104 S. Ct. 3138, 3148-3149 n. 23 (1984); *Massachusetts Mut. Life Co. v. Ludwig*; 426 U.S. 479, 480-481 (1976); 9 *Moore's Federal Practice* ¶ 204.11[3] (2d ed.).

> with comparable climatic conditions. . . . If per capita use were reduced to about 300 gallons per day, which is considered to be an ample supply, the water presently available would be adequate for the population of about 70,000 anticipated by the year 2000.

H.R. Doc. No. 181, 84th Cong., 1st Sess. at 2, 4, 17 (1955). Thus, Congress considered M & I use for Reno and Sparks, determined such use unnecessary and decided against it. Unanticipated population growth and inconsistent administrative interpretations cannot change this clear congressional intent. Moreover, the Secretary would be legally unable to sell Stampede water for such use without first obtaining congressional authorization under the Water Supply Act, 43 U.S.C. § 390b, Tribe App. 1a, which he undisputedly has not done.

Second, petitioners have no private right of action to compel reimbursement. The Reclamation Act's reimbursement provisions, 43 U.S.C. § 485-485(h), were explicitly enacted to benefit agriculture and the federal government, not power companies and water districts catering to urban business and industry. Thus, petitioners cannot satisfy the four-part test for finding a private right of action under *Cort v. Ash*, 422 U.S. 66, 78 (1975). *See California v. Sierra Club*, 451 U.S. 287 (1981).

Finally, petitioners lack standing to compel reimbursement. Since the Reclamation Act's reimbursement provision was not enacted to benefit power companies and water districts, petitioners lack "a right to judicial relief" and have no standing under *Warth v. Seldin*, 422 U.S. 490 (1975). Petitioners' interests as taxpayers and potential water buyers are insufficient to grant them standing. *Valley Forge College v. Americans United*, 454 U.S. 464 (1982); *United States v. Richardson*, 418 U.S. 166 (1974).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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February 1985

APPENDIX

APPENDIX

The Water Supply Act of 1958

43 U.S.C. § 390b

(a) It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects.

(b) In carrying out the policy set forth in this section, it is provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: *Provided*, That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: *Provided further*, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: *And provided further*, That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage

will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project: *And provided further*, That the entire amount of the construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply until such supply is first used, and (2) no interest shall be charged on such cost until such supply is first used, but in no case shall the interest-free period exceed ten years. The interest rate used for purposes of computing interest during construction and interest on the unpaid balance shall be determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which construction is initiated, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations, which are neither due nor callable for redemption for fifteen years from date of issue. The provisions of this subsection insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Projects Act of 1939 relating to the same subject.

(c) The provisions of this section shall not be construed to modify the provisions of section 701-1 of Title 33 and section 390 of this title, as amended and extended, or the provisions of sections 372 and 383 of this title.

(d) Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law. Pub.L. 85-500, Title III, § 301, July, 1958, 72 Stat. 319; Pub.L. 87-88, § 10, July 20, 1961, 75 Stat. 210.